TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 13

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK, APPELLANT,

vs.

WILLIAM F. SUDDATH, AS RECEIVER OF THE AMERICAN NATIONAL BANK OF ABILENE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED AUGUST 16, 1907.

(20,831.)

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SUPREME COURT OF THE UNITED STATES.

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vs.

WILLIAM F. SUDDATH, AS RECEIVER OF THE AMERICAN NATIONAL BANK OF ABILENE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 29, 1908.

a United States Circuit Court of Appeals for the Second Circuit.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK,
Complainant-Appellant,
vs.
WILLIAM F. SUDDATH, as Receiver of the American National Bank of Abilene, Defendant-Appellee.

Transcript of Record.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Printed under the Direction of the Clerk.

[Stamped:] United States Circuit Court of Appeals, Second Circuit. Filed Jan. 5, 1907. William Parkin, Clerk.

1 Circuit Court of the United States, Southern District of New York.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK
against
WILLIAM F. SUDDATH, as Receiver of the American National Bank of Abilene.

Bill of Complaint.

To the Judges of the Circuit Court of the United States for the Southern District of New York, sitting in equity:

Your orator, The Hanover National Bank of the City of New York, in the State of New York, brings this its bill of complaint against William F. Suddath, as Receiver of the American National Bank of Abilene, in the State of Texas. And thereupon your orator complains and says:

I. That your orator is and for many years prior to 1905 was a corporation duly organized and existing under and by virtue of the laws of the United States authorizing the formation of national banking associations, having its principal office or place of business in the Borough of Manhattan, in the City of New York and State of New York.

II. That for some years prior to January 18th, 1905, The American National Bank of Abilene was a corporation duly or-
2 ganized and existing under and by virtue of the laws of the United States, authorizing the formation of national banking associations, having its principal office or place of business at the City of Abilene, in the State of Texas.

III. That on January 18th, 1905, said American National Bank was insolvent and has ever since continued insolvent and unable to

pay its debts, and on said January 18th, 1905, the Comptroller of the Currency of the United States, having become satisfied that the American National Bank was insolvent, did, under the authority of the Revised Statutes of the United States in such case made and provided, appoint Richard L. Van Zandt Receiver of The American National Bank of Abilene, and said Richard L. Van Zandt thereafter duly qualified according to law and entered upon the performance of his duties, and thereafter continued to perform his duties as receiver until on or about the thirtieth day of April, 1906, when said Richard L. Van Zandt resigned as such receiver; and that thereupon the Comptroller of the Currency of the United States did duly appoint William F. Suddath, as receiver of The American National Bank of Abilene and said William F. Suddath thereafter duly qualified according to law and entered upon the performance of his duties, and has ever since and now is performing his duties as receiver aforesaid.

IV. Your orator further shows that for upwards of a year prior to January, 1905, said American National Bank was a banking correspondent of said Hanover National Bank and kept with said Hanover National Bank a deposit account, depositing therein sundry sums of money which were placed to its credit without distinction, and withdrawing the same by checks, bills of exchange or other obligations in writing, payable at the place of business of the
3 Hanover National Bank, to the order of various persons and corporations, in the ordinary course of business, which were duly paid by the Hanover National Bank upon presentation, and from time to time accounts current were rendered and balances were adjusted between said banks; and that from time to time the American National Bank forwarded to the Hanover National Bank notes or commercial paper made by various persons and owned by the American National Bank, indorsing said paper and offering it to the Hanover National Bank for discount, with the request that in case the Hanover National Bank should discount said notes or commercial paper, the proceeds thereof should be deposited to the credit of the American National Bank in its said deposit account with the Hanover National Bank.

V. Your orator further shows that on or about November 27, 1903, the American National Bank entered into an agreement in writing with the Hanover National Bank, wherein and whereby, among other things, it agreed that all bills of exchange, notes, checks and the proceeds thereof, and all other securities, money and property of every kind owned by the American National Bank, or in which it had any interest, deposited with the Hanover National Bank, or thereafter to be deposited with the Hanover National Bank, or which might be in any wise in the Hanover National Bank, or under its control, as collateral security for loans and advances already made or thereafter to be made, to or for account of the American National Bank, by the Hanover National Bank, or otherwise, might be held, collected and retained by the Hanover National Bank, until all liabilities present or future, of the American National Bank, due or not due, of every kind, then or thereafter

contracted, should be paid and fully satisfied, as by said
4 agreement more fully appears, to which your orator begs leave to refer.

VI. Your orator further shows that on or about January 14th, 1905, the Hanover National Bank received from the American National Bank a note made by R. H. Logan and W. R. Logan for $3,000 payable to the order of the American National Bank and endorsed by it, and a letter accompanying the same offering said note for discount to the Hanover National Bank, with the request that if said note were discounted by the Hanover National Bank, its proceeds should be deposited to the credit of the American National Bank in its deposit account with the Hanover National Bank; that on or about January 14, 1905, the Hanover National Bank also received from the American National Bank a note of the Hayden Grocery Company for $2,000 payable to the order of the American National Bank and endorsed by it, and a letter accompanying the same offering said note for discount to the Hanover National Bank, with the request that if said note were discounted by the Hanover National Bank, its proceeds should be deposited to the credit of the American National Bank in its deposit account with the Hanover National Bank; that thereupon on January 14th, 1905, the Hanover National Bank notified the American National Bank by telegraph that it declined to discount said notes, and the Hanover National Bank thereupon held said notes awaiting a further communication from the American National Bank; that on or about January 16th, 1905, the Hanover National Bank also received from the American National Bank a note of C. B. & W. F. Scarborough for $1,500, and a note of L. W. Hollis for $3,500, both payable to the order of the American National Bank and endorsed by it, and a letter accompanying the same offering said notes for discount
5 to the Hanover National Bank with the request that if said notes were discounted by the Hanover National Bank, their proceeds should be deposited to the credit of the American National Bank in its deposit account with the Hanover National Bank; that thereupon on January 16th, 1905, the Hanover National Bank notified the American National Bank by telegraph that it declined to discount said notes, and the Hanover National Bank thereupon held said notes awaiting a further communication from the American National Bank; that in reply to said telegram, the American National Bank, on January 16th, 1905, wrote to the Hanover National Bank that as it declined to discount the notes forwarded as aforesaid, "should you prefer, we will send our bills payable, with collaterals attached;" that the regular time for the mails to pass between Abilene, Texas, and New York is approximately four days and said letter was received on or about January 20, 1905; that on January 17th, 1905, the Hanover Bank had in its hands, besides the notes above referred to (none of which were then due), the following notes discounted by the Hanover National Bank for the American National Bank upon its endorsement of said notes, viz: D. G. Hill, for $1,100, due January 18, 1905; George L. Paxton for $2,000, due February 14, 1906; J. H. Parramore for $2,000,

due March 9, 1905; C. W. Merchant & Sons for $7,000, due April 2, 1905, and Continental Oil & Cotton Company for $5,000, due May 9th, 1905.

VII. Your orator further shows that at the opening of business on the morning of January 17th, 1905, the balance to the credit of the American National Bank in its said deposit account with the Hanover National Bank was $16.15; that during the business hours of said January 17th, 1905, checks or other obligations of the American National Bank to the amount of $4,192.01, drawn on the Hanover National Bank and in favor of sundry persons and corporations, including a check dated January 11, 1905, for $3,825.45, in favor of the New York Life Insurance Company, were presented to the Hanover National Bank for payment and were paid at the request of the American National Bank, but no additional deposits were made by or additional remittances received from the American National Bank during said day, except a remittance of $12 which was credited to said account, so that at the close of business on January 17th, 1905, the account of the American National Bank with the Hanover Bank was overdrawn to the amount of $3,563.86; that is to say, the Hanover National Bank on said day advanced to and paid out for the account of the American National Bank, at its request, $3,563.86 in excess of any amount then standing to the credit of the American National Bank in its deposit account with the Hanover National Bank.

VIII. Your orator further shows that the Hanover National Bank advanced and paid out said amount of $3,563.86 to or for the account of the American National Bank without knowledge of the insolvency of the American National Bank and in reliance upon the possession of said four notes of R. H. Logan and W. R. Logan, Hayden Grocery Company, C. B. & W. F. Scarborough and L. W. Hollis above referred to.

IX. Your orator further shows that the Hanover National Bank entered said advance of $3,563.86 upon its books and made a temporary loan to the American National Bank of $3,500, payable on demand, and carried the balance of $63.86 as an overdraft upon the said deposit account of the American National Bank; that on July 18th, 1905, the Hanover National Bank received from the American National Bank a remittance of $27.50, and on January 20th, 1905, a remittance of $205.41, which the Hanover National Bank applied in reduction of said overdraft, leaving a balance in said deposit account to the credit of the American National Bank of $169.05; that thereafter, the Hanover National Bank incurred expenses on account of the American National Bank, for express charges, exchange and insurance in collecting the rediscounted notes held by it, amounting to $13.25, which left a net balance in said deposit account to the credit of the American National Bank of $155.80, which the Hanover National Bank applied in reduction of the indebtedness of the American National Bank to it.

X. Your orator further shows that at maturity all said notes of D. G. Hill, George L. Paxton, J. H. Parramore, C. W. Merchant &

Sons and Continental Oil & Cotton Company above referred to, were paid, and the liability of the American National Bank as endorser thereon was thereby extinguished; but that no part of said advance or loan of $3,500 on January 17th, 1905, was paid by the American National Bank, or by the receiver of said bank, nor has any tender of said amount been made to the Hanover National Bank by the American National Bank or by its receiver, though at all times the Hanover National Bank was willing to surrender said notes upon payment of the indebtedness of the American National Bank to it.

XI. Your orator further shows that thereafter the Hanover National Bank collected the said note of the Hayden Grocery Company for $2,000, less a certain offset allowed by agreement with the receiver of the American National Bank, then acting, for moneys of said Hayden Grocery Company on deposit with the American National Bank at the time of its failure, and also collected the said note of C. B. & W. F. Scarborough for $1,500, and the said note of L. W. Hollis for $3,500 and paid over to the receiver of the Ameri-
8 can National Bank, then acting, between April 7, 1905, and November 14, 1905, the proceeds of said notes, except a sum which (including principal and interest) amounted on November 20th, 1906, to $3,725.86, being the exact amount then claimed to be due from the American National Bank to the Hanover National Bank; and which the Hanover National Bank then and since has held and retained as an offset against the claim of the American National Bank and its receiver; and also delivered to the receiver for the American National Bank, then acting, between April 7, 1905, and November 14, 1905, the said note of R. H. Logan and W. R. Logan for $3,000.

XII. Your orator further shows that on or about the 7th day of April, 1905, Richard L. Van Zandt, then acting as receiver of the American National Bank, by his attorney, Edward B. Whitney, Esq., began an action at law against the Hanover National Bank, in the United States Circuit Court, for the Southern District of New York, and by his complaint in said action set forth the incorporation of the Hanover National Bank and of the American National Bank, the insolvency of the American National Bank and the appointment of said Richard L. Van Zandt as receiver on January 18th, 1905, and also set forth four several causes of action respectively for the possession of said four notes of R. H. Logan and W. R. Logan, Hayden Grocery Company, C. B. & W. F. Scarborough and L. W. Hollis hereinabove more particularly described, or in case possession thereof could not be given, for the sum of $10,000, being the aggregate face value thereof; that thereafter, the Hanover National Bank, the defendant in said action, served its answer, setting forth the circumstances under which said notes were received and the payment of the overdraft in reliance thereon, substantially as hereinabove
9 set forth and claiming a lien thereon by virtue of the collateral agreement dated November 27th, 1903, hereinabove referred to, and by virtue of its banker's lien, and claiming the right to set off the indebtedness of the American National Bank to it against said notes or their proceeds; that thereafter, and on No-

vember 14th, 1905, the cause was tried in the Circuit Court of the United States for the Southern District of New York, and after hearing the evidence of the respective parties, the jury by direction of the court found a verdict in favor of the defendant therein, and thereupon judgment was filed in favor of the defendant therein upon the merits; that thereafter, a writ of error was duly allowed to review the said judgment and was heard by the United States Circuit Court of Appeals for the Second Circuit; that thereafter the said Honorable Court handed down a decision, holding that the assignment of error based upon the ruling directing a verdict for the defendant in said action was well taken and that the judgment should be reversed; and further holding in substance that the defendant therein was not entitled to set off or counterclaim the indebtedness owing to it by the American National Bank when the latter became insolvent, that such a defense was not available in an action at law for conversion, and that if the defendant therein had any right of equitable set off, it should have been asserted by a bill in equity; that thereafter, a mandate issued out of the said United States Circuit Court of Appeals for the Second Circuit, directing judgment in accordance with its said decision, and judgment was accordingly entered in the United States Circuit Court for the Southern District of New York on the fifth day of November, 1906, reversing the judgment theretofore entered in said action and directing that a new trial be had and further proceedings taken according to law; that a new trial was had on November 20, 1906, and a verdict in favor of the said receiver as plaintiff therein for $3,725.86 was directed by the court and said receiver is threatening to enter judgment upon said verdict.

XIII. Your orator is advised that by reason of the insolvency of the American National Bank, the Hanover National Bank became entitled in equity to offset the indebtedness due to it from the American National Bank on January 18, 1905, against the demand of the American National Bank or its receiver for said four notes or their proceeds, *pro tanto;* and your orator is advised that said Circuit Court, sitting as a court of law has not jurisdiction to entertain and adjudge upon the setoff pleaded as aforesaid and that relief should be sought in a court of equity; but your orator is informed and believes that said William F. Suddath, as receiver of the American National Bank, disregarding the rights of your orator, intends to prosecute said action at law and obtain judgment against said Hanover National Bank for the balance of proceeds of said notes and enforce the collection thereof, whereby the Hanover National Bank will be deprived of its right to offset the indebtedness due from the American National Bank to it against the amount claimed by said receiver.

All of which being contrary to equity and good conscience and tending to manifest wrong, injury and oppression of your orator; and forasmuch as your orator has no adequate remedy in the premises at and by the strict rules of common law and is only relievable in a court of equity where matters of this nature are properly cognizable and re*l*evable, to the end therefore that your orator may have that relief which it can only obtain in a court of equity, and that the said

defendant may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by your orator, it now prays the court that an accounting may be had in respect to all the
11 matters and things herein mentioned and the amount due your orator be ascertained, and a decree be entered adjudging the amount so found to be due to be allowed and set off against any amount found to be due from your orator to said defendant, arising out of said notes, or the proceeds thereof, and that said William F. Suddath, as receiver of The American National Bank of Abilene, be restrained and enjoined from further prosecution of any action at law to recover said notes or any balance of the proceeds thereof from The Hanover National Bank of the City of New York, and that it may please your Honors to grant to your orator a writ of injunction *pendente lite* directed to said William F. Suddath as such receiver and to his attorneys and agents, restraining the prosecution of such action at law until such time as your Honors shall appoint and order herein, or the final determination of this suit, and that thereupon the said injunction may be made perpetual and that your orator may have such further other or different order of relief in the premises as may be just.

May it please your Honors to grant unto your orator the Writ of Subpœna issued out of and under the seal of your Honorable Court to be directed to the said William F. Suddath, as Receiver of the American National Bank of Abilene, by a certain day and under a certain penalty therein to be inserted, to be and appear before this Court and then and there to answer all and singular the premises, and further to stand and abide such order and decree herein as shall be agreeable to equity and good conscience.

And your orator will ever pray.

November 23, 1906.

PERCY S. DUDLEY,
Solicitor and of Counsel for The Hanover National Bank of the City of New York, Complainant.

12 SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

Elmer E. Whittaker, being duly sworn, says: I am Cashier of The Hanover National Bank of the City of New York, the orator in the foregoing bill of complaint. The foregoing bill of complaint is true of my own knowledge except as to matters therein stated to be alleged upon information and belief and as to those I believe it to be true. The reason this verification is not made by the complainant is that said complainant is a corporation.

ELMER E. WHITTAKER.

Sworn to before me this 23rd day of November, 1906.

JACOB NIEMAN,
Notary Public, N. Y. Co.

(Endorsed:) Circuit Court United States, Southern District of New York.—The Hanover National Bank of the City of New York, against William F. Suddath, as Receiver of The American National

Bank of Abilene.—Bill of Complaint.—Percy S. Dudley, Solicitor for Complainant, 26 Liberty St., New York.—U. S. Circuit Court, Southern District of New York.—Filed Nov. 23, 1906.—John A. Shields, Clerk.

13 *Demurrer.*

United States Circuit Court, Southern District of New York. In Equity.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK, Plaintiff,
against
WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene, Defendant.

The demurrer of the above named defendant, William F. Suddath, as Receiver of the American National Bank of Abilene, to the bill of complaint of the above named complainant.

This defendant doth demur to the said bill, and for cause of demurrer showeth,

That it appeareth by the plaintiff's own showing by said bill that he is not entitled to the relief prayed by the bill against this defendant, said bill being insufficient and devoid of equity.

Wherefore the said defendant prays judgment of this Honorable Court, whether he shall be compelled to make any answer to the said bill; and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

EDWARD B. WHITNEY,
Solicitor and of Counsel for Defendant.

14 I hereby certify that the foregoing demurrer is in my opinion well founded in point of law, and is not interposed for delay.

New York, November 26, 1906.

EDWARD B. WHITNEY,
Counsel for Defendant.

(Endorsed:) United States Circuit Court, Southern District of New York.—Hanover National Bank of the City of New York, Plaintiff, against William F. Suddath, as Receiver of the American National Bank of Abilene, Defendant.—Demurrer to Bill of Complaint.—Edward B. Whitney, Solicitor and of Counsel for Defendant, 26 Liberty St., New York.—U. S. Circuit Court, Southern District, New York—Filed Nov. 26, 1906.—John A. Shields, Clerk.

15 *Final Decree.*

Circuit Court of the United States, Southern District of New York.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK,
Plaintiff,
against
WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene, Defendant.

The complainant in the above-entitled cause having filed his bill of complaint annexed hereto on November 23, 1906, and the writ of subpœna having been thereupon issued, and the defendant having appeared and demurred to the bill of complaint for lack of equity, and an application having been made before me for a preliminary injunction restraining the defendant during the pendency of this suit, and upon the hearing of said motion the parties having stipulated and agreed in open court that the cause should be taken as submitted upon final hearing upon the said bill of complaint and demurrer, and that the court should enter a final decree herein according to equity, the complainant waiving the affidavit of defendant to the demurrer, and both parties waiving notice of hearing, and the court having heard the parties by their respective counsel and due deliberation, having been had;

It is hereby decreed, that the bill of complaint be and the same hereby is dismissed without costs.

Nov. 27, 1906.

E. HENRY LACOMBE.
U. S. Circuit Judge.

16 (Endorsed:) Circuit Court of the United States, Southern District of New York.—The Hanover National Bank of the City of New York, Plaintiff, against William F. Suddath, as Receiver of the American National Bank of Abilene, Defendant.—Final Decree.—U. S. Circuit Court, Southern District New York.—Filed Nov. 27, 1906.—John A. Shields, Clerk.

17 *Petition for Appeal.*

Circuit Court of the United States, Southern District of New York.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK,
Plaintiff,
against
WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene, Defendant.

Petition for Appeal.

The above-named complainant, The Hanover National Bank of the City of New York, conceiving itself aggrieved by the final decree entered in the above entitled cause on November 27th, 1906, hereby appeals from so much of said final decree as adjudges and decrees that the complainant's bill of complaint be dismissed and that the complainant is not entitled to set off the amount due to it from the American National Bank of Abilene, at the time of the appointment of the above-named William F. Suddath as Receiver of said American National Bank of Abilene, against the claim made against the complainant by said William F. Suddath as such receiver, and that the complainant is not entitled to an injunction against said William F. Suddath, as such receiver, to restrain him from the prosecution of any action at law for the enforcement of his claim against the complainant. And The Hanover National Bank of the City of New York prays that this, its appeal to the United States Circuit Court of Appeals for the Second Circuit, may be allowed and that a transcript of the record and proceedings and papers upon which said final decree was made, duly authenticated, may be
18 sent to said United States Circuit Court of Appeals for the Second Circuit.

And now, at the time of filing this petition for appeal, The Hanover National Bank of the City of New York, appellant, files an assignment of errors, setting up separately and particularly each error asserted and intended to be urged in the United States Circuit Court of Appeals for the Second Circuit.

And your petitioner will ever pray, &c.

Dated December 1st, 1906.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK, *Appellant*,
By PERCY S. DUDLEY, *Solicitor*.

The foregoing appeal is allowed.
Dated, December 4th, 1906.

E. H. LACOMBE,
Circuit Judge.

(Endorsed:) Circuit Court of the United States, Southern District of New York.—The Hanover National Bank, of the City of New York, against William F. Suddath, as Receiver of the Ameri-

can National Bank of Abilene.—Petition and *Other* Allowing Appeal.—Percy S. Dudley, Solicitor for Appellant, 26 Liberty St., New York City.—Copy received.—Dated December 5, 1906.—Edward B. Whitney, Attorney for Appellee-Deft.—U. S. Circuit Court, Southern District, New York.—Filed, Dec. 6, 1906.—John A. Shields, Clerk.

19 *Assignment of Errors.*

Circuit Court of the United States, Southern District of New York.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK
against
WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene.

And now comes the said complainant and says that in the record and proceedings and decree in this cause there is manifest error in this, to wit:

First. That the Court erred in sustaining the demurrer of the defendant on the ground that it appeared by the complainant's bill that said bill was insufficient and devoid of equity and that the complainant was not entitled to the relief prayed by said bill against the defendant.

Second. That the Court erred in refusing to allow the complainant to set off the amount due to it from the American National Bank of Abilene at the time of the appointment of the above-named William F. Suddath, as receiver of the said American National Bank of Abilene against the claim made against the complainant by said William F. Suddath as such receiver.

Third. That the Court erred in refusing to enjoin the above-named defendant from the prosecution of any action at law for the enforcement of his claim against the complainant.

Fourth. That the Court erred in dismissing the complainant's bill of complaint.

20 Wherefore complainant prays that the said decree be reversed.

PERCY S. DUDLEY,
Solicitor for Complainant.

(Endorsed:) United States Circuit Court, Southern District of New York—The Hanover National Bank of the City of New York, against William F. Suddath, as Receiver of the American National Bank of Abilene.—Assignment of Errors.—Percy S. Dudley, Solicitor for Complainant, 26 Liberty St., New York City.—U. S. Circuit Court, Southern District New York.—Filed Dec. 4, 1906.—John A. Shields, Clerk.

21 *Bond.*

Circuit Court of the United States, Southern District of New York.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK
against
WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene.

Know all men by these presents, that We, The Hanover National Bank of the City of New York, as principal, and Henry R. Carse, as surety, are held and firmly bound unto William F. Suddath, as Receiver of the American National Bank of Abilene, the respondent above-named, in the sum of Five hundred dollars to be paid to the said receiver, or his successors, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our successors, representatives and assigns firmly by these presents.

Sealed with our seals and dated the first day of December, 1906.

Whereas, the above-named complainant, The Hanover National Bank of the City of New York, has taken an appeal to the United States Circuit Court of Appeals for the Second Circuit, to reverse the decree in the above entitled cause by the Circuit Court of the United States for the Southern District of New York,

Now, therefore, the condition of this obligation is such that
22 if the above-named complainant shall prosecute said appeal to effect and answer all costs and damages that may be adjudged or awarded against it, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

THE HANOVER NATIONAL BANK OF
THE CITY OF NEW YORK,
By ELMER E. WHITTAKER, *Cashier.*
HENRY R. CARSE. [SEAL.]

CITY AND COUNTY OF NEW YORK,
Southern District of New York, ss:

On this first day of December, in the year One thousand nine hundred and six, before me personally came Elmer E. Whittaker, to me known, who being by me duly sworn, did depose and say; that he resided in the City of New York; that he is the cashier of the Hanover National Bank of the City of New York, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

JACOB NIEMAN,
Notary Public, N. Y. Co.

CITY AND COUNTY OF NEW YORK,
Southern District of New York, ss:

On this first day of December, Nineteen hundred and six, before me personally came Henry R. Carse, to me personally known
23 and known to me to be the same person described in and who executed the foregoing instrument and duly acknowledged to me that he executed the same.

JACOB NIEMAN,
Notary Public, N. Y. Co.

Form and sufficiency of the foregoing bond and approval thereof consented to.

EDWARD B. WHITNEY,
Solicitor for Respondent.

(Endorsed:) Circuit Court United States, Southern District of New York.—The Hanover National Bank of the City of New York, against William F. Suddath, as Receiver of the American National Bank of Abilene.—Bond.—Percy S. Dudley, Attorney for Hanover National Bank, 26 Liberty St., New York City.—Approved as to form and also as to sufficiency of sureties with reservation however to the Deft-Appellee, of the right at any time to examine the sureties under oath touching their assets, liabilities and financial condition generally.—E. H. Lacombe, U. S. Circuit Judge.—U. S. Circuit Court, Southern District New York—Filed Dec. 4, 1906.—John A. Shields, Clerk.

24 *Citation.*

By the Honorable E. Henry Lacombe, one of the Judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit,

To William F. Suddath, as Receiver of the American National Bank of Abilene, Appellee, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the District and Circuit above named, on the second day of January, 1907, pursuant to a petition for appeal filed in the Clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein the Hanover National Bank of the City of New York is appellant and you are appellee, to show cause, if any there be, why the decree in said petition of appeal mentioned should not be corrected and speedy justice done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 4th day of December, in the year of our Lord One Thousand Nine Hundred and Six, and of the Independence of these United States the One Hundred and Thirty-first.

E. H. LACOMBE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed:) United States Circuit Court of Appeals, for
25 the Second Circuit.—The Hanover National Bank, etc., Appellant, *vs.* William F. Suddath, as Receiver, &c., Appellee.—Citation.—Copy received, December 5th, 1906. Edward B. Whitney, Atty. for Appellee. U. S. Circuit Court, Southern District New York.—Filed Dec. 6, 1906.—John A. Shields, Clerk.

26 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby Certify that the foregoing pages, numbered from one to twenty-five, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK,
Appellant,
against
WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene, Appellee,

as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Second Circuit, this 5th day of January, in the year of our Lord One Thousand Nine Hundred and Seven, and of the Independence of the said United States the One Hundred and Thirty-first.

JOHN A. SHIELDS, *Clerk.*

27 United States Circuit Court of Appeals for the Second Circuit.

No. 265, October Term, 1906.

Argued April 12, 1907; Decided April 30, 1907.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK,
Complainant-Appellant,
vs.
WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene, Defendant-Appellee.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Before Judges Wallace, Townsend and Coxe.

On appeal from a decree of the Circuit Court of the Southern District of New York sustaining a general demurrer and dismissing the bill without costs.

Per Curiam:

This is an equity action brought by the Hanover National Bank against William F. Suddath, as receiver of the American National Bank of Abilene, Texas. The relief prayed for is

First. That an accounting be ordered to ascertain the amount due to the complainant and that the amount so found may
28 be set off against any amount found to be due from the complainant to the defendant.

Second. That the defendant be enjoined from the further prosecution of any action at law based upon the notes referred to in the *bill.*

The facts sufficiently appear in the opinion of this court in *Van Zandt v. The Hanover Nat. Bank* (149 *Fed. Rep.* 127).

It is manifest that if the Hanover Bank was unauthorized to use the notes sent to it by the Abilene Bank, except for the specific purpose mentioned in the letter of instructions transmitting them, this action cannot succeed. The mere fact that property of the Abilene Bank was temporarily in the hands of the Hanover Bank did not give the latter a right to apply that property in payment of the former's overdraft. The Hanover Bank was under no legal obligation to pay the checks of the Abilene Bank when that bank had no balance on deposit with which to meet the checks. The Hanover Bank in paying these checks and thus creating an overdraft undoubtedly acted from the most praiseworthy motives, but the failure of the Abilene Bank on the succeeding day subjected its property, wherever situated, to the payment of the claims of its creditors.

In the *Van Zandt* case this court said:

"The notes in controversy were never deposited by the Abilene Bank with defendant, nor did they come into its hands a collateral security within the commonly accepted meaning of these terms. They were temporarily in the hands of the defendant under an option to purchase them. We conclude that they did not come within the terms of the pledge, and that the defendant did not obtain a lien upon them.

If the check drawn by the Abilene Bank upon the defendant which caused the overdraft of its account, had been drawn with knowledge of the defendant's refusal to discount the notes, a different question would be presented, but it is fair to assume that
29 this check was drawn in the expectation that before its presentation the notes would have been discounted and the proceeds credited to the Abilene Bank."

The decree is affirmed.

Percy S. Dudley, for the Complainant-Appellant.
Edward B. Whitney, for the Defendant-Appellee.

30 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 10th day of May one thousand nine hundred and seven.

Present: Hon. William K. Townsend, Hon. Alfred C. Coxe, Circuit Judges.

HANOVER NATIONAL BANK, Complainant-Appellant,
vs.
WILLIAM F. SUDDATH, as Receiver, etc., Defendant-Appellee.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said Circuit Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said Circuit Court in accordance with this decree.

W. K. T.
A. C. C.

31 Endorsed: United States Circuit Court of Appeals, Second Circuit. Hanover Bank *vs.* Suddath. Order for Mandate. United States Circuit Court of Appeals Second Circuit Filed May 10 1907. William Parkin Clerk.

32 United States Circuit Court of Appeals, Second Circuit.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK, Complainant-Appellant,
against
WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene, Defendant-Appellee.

The above-named complainant-appellant, The Hanover National Bank of the City of New York, conceiving itself aggrieved by the judgment entered in the above entitled cause on May tenth, 1906, affirming the final decree entered in the above entitled cause in the Circuit Court of the United States for the Southern District of New York on November 27th, 1906, hereby appeals from so much of said judgment of affirmance as adjudges and decrees that the complainant's bill of complaint be dismissed and that the complainant is not entitled to set off the amount due to it from The American National Bank of Abilene at the time of the appointment of the above-named William F. Suddath as Receiver of said American National Bank of Abilene, against the claim made against the complainant by said William F. Suddath, as such receiver, and that the complainant is not entitled to an injunction against said William F. Suddath, as such receiver, to restrain him from the prosecution of any action at law for the enforcement of his claim against the complainant. And The Hanover National Bank of the City of New York prays that this, its appeal to the Supreme Court of the United

States, may be allowed and that a transcript of the record
33 and proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the said Supreme Court of the United States.

And now, at the time of filing this petition for appeal, The Hanover National Bank of the City of New York, appellant, files an assignment of errors, setting up separately and particularly each error asserted and intended to be urged in the Supreme Court of the United States.

And your petitioner will ever pray, &c.

Dated July 29, 1907.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK,
By PERCY S. DUDLEY, *Solicitor.*

The foregoing appeal is allowed.

Dated July 31 1907.

ALFRED C. COXE,
U. S. Cir. Judge.

34 Endorsed: United States Circuit Court of Appeals, Second Circuit. The Hanover National Bank of the City of New York, Complainant-Appellant, against William F. Suddath, as Receiver of The American National Bank of Abilene, Defendant-Appellee. Petition and Order Allowing Appeal. Percy S. Dudley, Solicitor for Appellant, 26 Liberty Street, Borough of Manhattan, New York City. United States Circuit Court of Appeals Second Circuit Filed Aug 3, 1907 William Parkin Clerk.

35 United States Circuit Court of Appeals, Second Circuit.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK,
Complainant-Appellant,
against
WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene, Defendant-Appellee.

And now comes the said complainant-appellant and says that in the record and proceedings and judgment in this cause there is manifest error in this, to wit:

First. That the Court erred in affirming the decree of the Circuit Court of the United States for the Southern District of New York, sustaining the demurrer of the defendant-appellee on the ground that it appeared by the complainant's bill that said bill was insufficient and devoid of equity and that the complainant was not entitled to the relief prayed by said bill against the defendant-appellee.

Second. That the Court erred in affirming the decree of the Circuit Court of the United States for the Southern District of New York, refusing to allow the complainant-appellant to set off the amount due to it from The American National Bank of Abilene at the time of the appointment of the above-named William F.

Suddath as Receiver of the said The American National Bank of Abilene against the claim made against the complainant-appellant by said William F. Suddath as such receiver.

36 Third. That the Court erred in affirming the decree of the Circuit Court of the United States for the Southern District of New York, refusing to enjoin the above-named defendant-appellee from the prosecution of any action at law for the enforcement of his claim against the complainant-appellant.

Fourth. That the Court erred in affirming the decree of the Circuit Court of the United States for the Southern District of New York, dismissing the complainant's bill of complaint.

Wherefore, complainant prays that the said judgment be reversed.

PERCY S. DUDLEY,
Solicitor for Complainant-Appellant.

37 Endorsed: United States Circuit Court of Appeals, Second Circuit. The Hanover National Bank of the City of New York, Complainant-Appellant, against William F. Suddath, as Receiver of The American National Bank of Abilene, Defendant-Appellee. Assignment of Errors Percy S. Dudley, Solicitor for Appellant, 26 Liberty Street, Borough of Manhattan, New York City. United States Circuit Court of Appeals Second Circuit Filed Aug 3, 1907 William Parkin Clerk.

38 United States Circuit Court of Appeals, Second Circuit.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK,
Complainant-Appellant,
against
WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene, Defendant-Appellee.

Know all men by these presents, that We, the Hanover National Bank of the City of New York, as principal, and Henry R. Carse, as surety, are held and firmly bound unto William F. Suddath, as Receiver of The American National Bank of Abilene, the defendant-appellee above named, in the sum of Five hundred dollars to be paid to the said receiver or his successors, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the twenty-ninth day of July, 1907.

Whereas, the above-named complainant-appellant, The Hanover National Bank of the City of New York, has taken an appeal to the Supreme Court of the United States, to reverse the judgment in the above entitled cause by the United States Circuit Court of Appeals for the Second Circuit.

Now, therefore, the condition of this obligation is such that if the above-named complainant-appellant shall prosecute said

39 appeal to effect and answer all costs and damages that may be adjudged or awarded against it, if it shall fail to make

good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK,
[SEAL.] By ALEX. D. CAMPBELL, *Assistant Cashier.*
HENRY R. CARSE. [SEAL.]

CITY AND COUNTY OF NEW YORK,
Southern District of New York, ss:

On this twenty-ninth day of July, in the year One thousand nine hundred and seven, before me personally came Alexander D. Campbell, to me known who being by me duly sworn, did depose and say; that he resided in the City of New York; that he is an Assistant Cashier of the Hanover National Bank of the City of New York, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

[SEAL.] JACOB NIEMANN,
Notary Public, N. Y. Co.

CITY AND COUNTY OF NEW YORK,
Southern District of New York, ss:

On this twenty-ninth day of July, Nineteen hundred and
40 seven, before me personally came Henry R. Carse, to me personally known and known to me to be the same person described in and who executed the foregoing instrument, and duly acknowledged to me that he executed the same.

[SEAL.] JACOB NIEMANN,
Notary Public, N. Y. Co.

Form and sufficiency of the foregoing bond and approval thereof consented to. EDWARD B. WHITNEY,
Solicitor for Appellee.

41 Endorsed: United States Circuit Court of Appeals, Second Circuit. The Hanover National Bank of the City of New York, Complainant-Appellant, against William F. Suddath, as Receiver of The American National Bank of Abilene, Defendant-Appellee. Copy Bond Percy S. Dudley, Solicitor for Appellant, 26 Liberty Street, Borough of Manhattan, New York City. Approved A C Coxe U S Cir Judge, United States Circuit Court of Appeals Second Circuit Filed Aug 3, 1907 William Parkin Clerk.

42 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 41 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in

the case of Hanover National Bank of the City of New York against William F. Suddath as Receiver, etc, (Equity case) as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 3d day of August in the year of our Lord One Thousand Nine Hundred and Seven and of the Independence of the said United States the One Hundred and thirty-second.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

43 By the Honorable E. Henry Lacombe, one of the Judges of the United States Circuit Court of Appeals for the Second Circuit.

To William F. Suddath, Receiver of The American National Bank of Abilene, defendant-appellee, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at the City of Washington, in the District of Columbia, on the 30th day of October, 1907, pursuant to a petition for appeal filed in the Clerk's Office of the United States Circuit Court of Appeals for the Second Circuit, wherein The Hanover National Bank of the City of New York is appellant, and you are Appellee, to show cause, if any there be, why the judgment in said petition of appeal mentioned should not be corrected and speedy justice done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the Circuit above named, this 31st day of July, in the year of Our Lord, One thousand nine hundred and seven, and of the Independence of these United States the One Hundred and thirty-second.

[Seal United States Circuit Court of Appeals, Second Circuit.]

ALFRED C. COXE,
Judge of the United States Circuit Court of Appeals for the Second Circuit.

44 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. The Hanover National Bank of the City of New York, Complainant-Appellant, against William F. Suddath, as Receiver of the American National Bank of Abilene, Defendant-Appellee. Orig. Citation Percy S. Dudley, Solicitor for Appellant, 26 Liberty Street, Borough of Manhattan, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Aug 3 1907. William Parkin Clerk. Due and timely service of a copy of the within citation is hereby admitted Dated August 3rd 1907 Edward B. Whitney.

Endorsed on cover: File No. 20,831. U. S. circuit court of appeals, 2d circuit. Term No. 164. The Hanover National Bank of the City of New York, appellant, *vs.* William F. Suddath as Receiver of the American National Bank of Abilene. Filed August 16th, 1907. File No. 20,831.

Office Supreme Court, U. S.
FILED.
APR 8 1909
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. ~~163~~ 12

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK,
Plaintiff-in-Error,

vs.

WILLIAM F. SUDDATH, AS RECEIVER OF THE AMERICAN NATIONAL BANK OF ABILENE.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

PERCY S. DUDLEY,
Of Counsel.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

The Evening Post Job Printing Office, 156 Fulton St., N. Y.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 163.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK, Plaintiff in Error,

vs.

WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene.

In Error to the United States Circuit Court of Appeals for the Second Circuit.

Brief for the Plaintiff in Error.

The action was originally brought by Richard L. Van Zandt, as Receiver of The American National Bank of Abilene, Texas, acting under the direction of the Comptroller of the Currency, for the recovery from the possession of the Hanover National Bank of four promissory notes alleged to be the property of the plaintiff. Prior to the failure of the Abilene Bank these notes had been forwarded to the

Hanover Bank for discount, which was refused (fols. 7-14).

The answer of the Hanover Bank set forth that $3,500 had been loaned to the Abilene Bank upon the security of the four notes, and that it was entitled to retain possession thereof until said loan was repaid, by reason of its general banker's lien and by reason of a special lien created by a collateral written agreement between the two banks (fols. 15-26).

The action was tried at Circuit before Judge Lacombe on November 14, 1905, and a verdict was directed in favor of the defendant. Upon a writ of error, the Circuit Court of Appeals reversed the judgment below, Judge Wallace writing an opinion which is reported 149 Fed. Rep. 127. Van Zandt having resigned as Receiver, William F. Suddath was appointed as his successor and substituted in the action.

The case was retried before Judge Hough on November 20, 1906, and a verdict directed in favor of the plaintiff for $3,725.86. The Circuit Court of Appeals, upon substantially the same record as upon the first trial, affirmed the judgment upon the grounds stated in the previous decision (fols. 42 and 43). The Hanover Bank was then allowed a writ of error for the review by this Court of the judgments below (fols. 46-60).

Specification of Error.

The affirmance of the ruling of the Circuit Court directing a verdict in favor of the defendant-in-error, the plaintiff below (fol. 49).

Statement of Facts.

The Hanover Bank, for more than a year prior to January, 1905, had been the New York correspondent of the Abilene Bank. The latter bank

kept with the Hanover Bank an ordinary general deposit account, making deposits and withdrawing them by checks or other obligations, and, from time to time, forwarded to the Hanover Bank notes or commercial paper made by various persons and owned by said bank, endorsing such notes and offering them to the Hanover Bank for sale, with a request that, in case the Hanover Bank should buy said notes, the proceeds thereof should be deposited to the credit of the Abilene Bank in its deposit account (fols. 18 and 31).

On November 27, 1903, the Abilene Bank signed an agreement, a copy of which is annexed to the answer (fols. 25 and 26), by which a special lien was created in favor of the Hanover Bank for advances. This agreement was in force at the time of the transaction in question, and is more fully referred to below.

On January 9th and 10th, 1905, the Abilene Bank wrote to the Hanover Bank, enclosing in the letters respectively notes of third persons for $2,000 and $3,000, and requesting the Hanover Bank to discount the same and place the proceeds to the credit of the Abilene Bank. These letters were received by the Hanover Bank on January 14th, and on that date it replied by the following telegrams: "Referring letters ninth and tenth not agreeable," and "Referring previous dispatch transfer or ship currency" (fols 31 and 32).

On January 12th, 1905, the Abilene Bank enclosed in a similar letter "for discount and credit" two notes for $3,500 and $1,500 respectively. This was received by the Hanover Bank on January 16th, and on the same day the Hanover Bank telegraphed: "Letter Jany. twelfth recd not satisfactory," and also wrote: "Your letter of the 12th instant, with enclosures, is at hand, and we have just wired you 'Letter 12th received. Not satisfactory.' We are not discounting the enclosures for you, but

hold same as collateral to your indebtedness to us, and remain" (fols. 32 and 33). This letter did not reach Abilene until January 20th.

On January 16th, the Abilene Bank wrote: "We have just received your wire. The rediscounts we sent you were mostly renewals and in every instance, 'good as gold.' Since the drop in cotton, collections are at a standstill, and our clients expect us to stay with them, and we are obliged to ask the same indulgence from our correspondents. Should you prefer, we will send our B/P with collaterals attached. We trust you will accord us the leniency asked for." This letter did not reach New York until January 20th (fol. 34).

On January 16th and 17th the Hanover Bank held unmatured notes, rediscounted for the Abilene Bank and endorsed by it, to the amount of $17,100 (fols. 20 and 33).

On January 17th, in the morning, the balance in the deposit account to the credit of the Abilene Bank was only $616.15. During the day, checks to the amount of $4,192.01, including one for $3,825.45, dated January 11, 1905, and drawn by the Abilene Bank, were presented to the Hanover Bank for payment. Having received no answer to its letters and telegrams, the Hanover Bank telegraphed: "Sent you two telegrams January fourteenth. Telegraph us what you have done" (fol. 33).

Still receiving no response, the vice-president of the Hanover Bank, on being informed that the checks presented, if paid, would overdraw the account, got out the collateral agreement above referred to, looked at it, and, believing that the Hanover Bank had the right to hold the four notes in question, authorized the overdraft which made the checks good (fol. 34). He then credited the deposit account with a loan of $3,500, which practically balanced it, and wrote the Abilene Bank: "As your

account showed overdrawn to-day over $3,000, we have made you a temporary loan of $3,500 against collateral in our hands." This letter did not reach Abilene until January 21st (fols. 33 and 34).

On January 18, 1905, the Abilene Bank closed its doors and went into the hands of the Receiver appointed by the Comptroller (fols. 34, 8 and 9). There is no proof of any insolvency prior to that time, or notice thereof to the Hanover Bank.

Since that time the rediscounts held by the Hanover Bank have been paid and it has collected from the four notes in question the loan of $3,500, turning over the balance of proceeds and other notes to the plaintiff and leaving in dispute the agreed sum of $3,725.86, for which amount the verdict was directed in favor of the plaintiff (fols. 31, 33 and 35).

Argument.

The plaintiff in error claims that it had the right to retain the four notes or the balance of their proceeds (1) by the express terms of the collateral agreement; (2) by virtue of its general bankers' lien; and (3) by authority or consent of the Abilene Bank.

1. The plaintiff in error had the right to retain the notes under the express terms of the collateral agreement.

It appears that the Hanover Bank was the New York correspondent of the Abilene Bank and on November 27, 1903, more than a year before the transaction in question, the two banks entered into an agreement upon which future transactions were to be based. It is a matter of common knowledge that banks all over the country keep balances with their correspondents in New York to meet their exchange drafts on New York, and that at times

such banks borrow money from their correspondents to maintain their balances and for other purposes. The relations between such correspondent banks are naturally closer than those between banks having only infrequent or isolated transactions (*Auten* vs. *U. S. Nat. Bank, 174 U. S., 125, 145*). It may be stated to be the common practice, if not also a matter of common knowledge, for such banks to enter into agreements similar to that in evidence here, the New York bank having its own general printed form which is signed by the out-of-town bank.

The obvious purpose of the parties was to enlarge the rights of the Hanover Bank beyond the legal implications which would arise from any single transaction and, in the expected series of transactions, to make all the property of the Abilene Bank in its hands security for any and every particular liability; the corresponding advantage to the Abilene Bank being a greater facility in obtaining credit due to the broader security held by the Hanover Bank. This purpose is manifest from the terms of the instrument and is confirmed by the fact that the instrument is a general form prepared for common use with customers of the Hanover Bank and not merely for special use with the Abilene Bank.

Such contracts are sanctioned by the authorities even where they relieve the pledgee from the common law duties which would ordinarily rest upon him, unless in contravention of a statute, against public policy or fraudulent. (*Hiscock* vs. *Varick Bank, 206 U. S., 28*, and cases cited.)

This collateral agreement, so far as material, runs that the Abilene Bank agrees "that all bills of "exchange, notes, checks, and the proceeds thereof, "and all other securities, money and property of "every kind owned by the undersigned, or either

"or any of them, or in which they or any or either "of them, have any interest deposited with said "bank, or which may hereafter be deposited with "said bank, or which may be in anywise in "said bank, or under its control, as collateral se- "curity for loans or advances already made or here- "after to be made to or for account of the under- "signed, by said bank, or otherwise, may be held, "collected and retained by said bank, until all "liabilities present or future of the undersigned, "or any or either of them, due or not due, of every "kind to said bank, now or hereafter contracted, "shall be paid and fully satisfied," &c.

If it be conceded that said notes were not placed in the possession of the Hanover Bank specifically as collateral security, nevertheless they were lawfully in the possession of the Hanover Bank as property of the Abilene Bank, and, under the agreement, as soon as the advance on the overdraft was made, the lien attached to the notes until the advance was repaid.

This seems to be the simple meaning of the words used and the plain intent of the instrument. In fact, the defendant in error admitted in the court below that the agreement could be so construed, but contended that it should not be applied to paper "non-contractually" obtained. It is not necessary to decide here that the agreement would apply to property accidentally or tortiously obtained, as suggested by the defendant in error, but merely that it applies to property rightfully in possession of the Hanover Bank. Giving a distinctive meaning to the several phrases used in the collateral agreement, this case falls within the phrase covering property "which may be in any wise in said bank," as distinguished from security specifically deposited. The Abilene Bank voluntarily sent the notes to the Hanover Bank for re-

discount, which was refused. If returned by mail, at least four days would have been lost, during which the Abilene Bank could not have used this property to secure necessary funds. The Hanover Bank therefore held the notes and telegraphed the Abilene Bank. This certainly was not wrongful and the possession of the notes must be deemed lawful and proper. This status was not changed except as the result of the acts of the Abilene Bank. With unauthorized confidence that the Hanover Bank would rediscount the notes and credit the proceeds, the Abilene Bank, on January 11, 1905, had sent out at least one check drawn on the Hanover Bank in excess of its actual deposit balance. On January 14, however, the Abilene Bank was informed of the refusal of the discount and was asked to "transfer [a credit from some other bank] or ship currency [direct]" (fol. 32.). Yet it neither complied with this request nor revoked its orders for payment addressed to the Hanover Bank and contained in its outstanding checks. Hence, when these checks were presented and the deposit account was overdrawn, which the Hanover Bank permitted in reliance on the notes, an implied contract arose and the lien attached.

But the defendant in error has claimed that the above construction is incorrect; that the words "as collateral security" limit and modify all the preceding phrases; and that, according to the punctuation, the words "or otherwise" express an alternative to advances *by the Hanover Bank* and not an alternative to a specific deposit as collateral security. The punctuation of the agreement is open to criticism, but not in this respect. Without a comma between "by said bank" and "or otherwise," there might be some ground for that construction, but the comma cuts the connection and refers this latter phrase to some previous phrase.

Besides, the meaning of the words does not admit of this construction. "Otherwise" means "in some other manner." The only other words indicating manner are "*as* collateral security," and hence "or" must be construed as co-ordinating "otherwise" with these words; whereas a proper correlative to "by said bank" would be "or [by] some other bank, corporation or individual." Furthermore, such a construction would have no practical meaning, as there can be no occasion for the Abilene Bank to deposit in the Hanover Bank security for loans or advances made by any other bank.

The learned Judge who wrote the opinion on the first appeal likewise conceded that the agreement was susceptible of the construction claimed by the plaintiff in error, and, so construed, would entitle the Hanover Bank to retain the notes; but he held that "the words 'or otherwise' may be read as "referring to the nature of the liability for which "the collateral is security, and as meaning to "pledge the collateral not only for loans and ad- "vances but also for any liabilities otherwise aris- "ing, such for instance as that of an endorser or "surety upon the commercial paper of third per- "sons. If the agreement had been intended to "pledge all securities belonging to the Abilene "Bank that might come in any manner to the "hands of the defendant, or even of all that might "rightfully come to its hands, that intention could "have been manifested unmistakably and in very "simple terms, by omitting the words 'deposited' "and 'collateral security,' &c. The latter are "descriptive words which identify the securities "which the defendant may hold and collect by "reference to the purposes for which they come into "his hands. If the contention for the defendant "in error is correct, these words were used un-

"necessarily." *(Van Zandt* vs. *Hanover Nat. Bank, 149 Fed. Rep., p. 129.)*

The construction placed on the instrument by Judge Wallace makes the words "as collateral security" a limitation of the securities and property previously referred to and makes the words "or otherwise" express an alternative to "loans or advances," so as to cover "liabilities otherwise arising, such, for instance, as that of an indorser or surety upon the commercial paper of third persons."

As noted above, the only grammatical correlative of the phrase "or otherwise" is the phrase "as collateral security," etc., those being the only words descriptive of manner.

If the agreement was intended to read "loans or advances * * * or otherwise," and, by so doing, to add other liabilities to "loans or advances," apt words were not used to express such an intent; indeed, with due respect to the learned judge, the words themselves, so read, are unintelligible without the addition of the words: "or *for liabilities* otherwise *arising*," which he himself found necessary to express his meaning. Certainly they do not "*pledge* the collateral not only for loans or advances but also for any liabilities otherwise arising," because there are no words of pledge in this connection, the whole clause being descriptive; and, further, because the succeeding clauses of the agreement provide that all the property so described "may be held * * * until all liabilities present and future * * * shall be paid," etc.

Nor were the words between "as collateral security" and "or otherwise" used unnecessarily, and it is the insertion of these words that led the learned Judge below to interpret the agreement as he did. But without them, there would have been

room for the claim that the collateral security referred to was only such as was then in possession of the bank for existing loans *(Farr* vs. *Nichols, 132 N. Y., 327,* and cases cited), and so it was specified to cover not only the security for loans already made but also the security for those thereafter to be made; "to or for account of the undersigned" referring naturally to loans to or advances for account of the undersigned.

In another place in his opinion Judge Wallace says: "The parties here were contracting with ref-"erence to notes, property, etc., which should be "deposited by the Abilene Bank with the defend-"ant, or should come under its control as collateral "security for certain obligations and liabilities, and "the general words 'or otherwise' should be held to "relate to notes and property which should come "to the hands of the defendant by way of deposit "or collateral security, or some other kind of bail-"ment" (p. 130).

Here the learned Judge seems to adopt a different construction and correlates "or otherwise" with "as collateral security," to that extent agreeing with the plaintiff in error; but he restricts the meaning to cases of bailment because he assumes that to have been the intent of the contracting parties. It may be enough to reply that in this case the Hanover Bank was the bailee of the notes at the time it allowed the overdraft *(Hunt* vs. *Wyman, 100 Mass., 198,* cited in *Benjamin on Sales, Sec. 2, Am. note)* and was therefore entitled to a lien upon them. But a correct construction of the instrument compels a broader interpretation. If the subject matter of the agreement was only property pledged or deposited in some other manner as security, no enlarging sense can be given to the words: "or which may be in anywise in said bank or under its control," as the verb "deposited" is

technically as broad as the words "as collateral security" (or any other words of bailment) which are supposed to qualify all that precedes. If the phrase "as collateral security" be referred to property "deposited" only, then the phrase "or otherwise" may be referred to property "which may be in anywise in said bank or under its control," and thus the whole clause will express a comprehensiveness which the instrument was obviously intended to effect.

In ordinary cases, one of the first acts of a bank whose correspondent suspends is to seize any balance of the deposit account. This, of course, could not be pledged as specific collateral. Under New York law, the bank could retain this as a set-off against matured paper, but not against unmatured paper *(Frank* vs. *Mercantile Nat. Bank, 182 N. Y., 264)*, although the rule in the United States courts is more liberal *(Schuler* vs. *Israel, 120 U. S., 506; Scott* vs. *Armstrong, 146 U. S., 499)*. Even this ordinary security must have been neglected under the agreement as construed by the court below, because the bank balance, not being already "collateral security" or other bailment, would not come within its terms. In fact, as so construed, the lien under the instrument is not extended beyond the scope of the ordinary banker's lien, and in this respect, no effect is given to the evident purpose of the parties.

The plaintiff in error submits that only by the construction for which it contends can accurate meaning be given to each and every word and phrase used and the evident intention of the parties effectuated, whereas the construction adopted by the court below renders certain words and phrases superfluous or gives them a meaning which the context does not bear out.

The learned Judge cites the case of *Gillet* vs. *Bank*

of America, 160 N. Y., 549, as an authority for applying the rule that this agreement must be construed most strictly against the Hanover Bank. The same case, in explaining that rule, says: "In "the construction of written contracts, it is the "duty of the court, as near as may be, to place itself "in the situation of the parties and from a con- "sideration of the surrounding circumstances, the "occasion and apparent object of the parties, to "determine the meaning and intent of the language "employed. Indeed, the great object, and prac- "tically the only foundation of rules for the con- "struction of contracts is to arrive at the inten- "tion of the parties. This is a most conspicuous "and far-reaching rule, and involves the nature of "the instrument, the condition of the parties "and the objects which they had in view, and "when the intent is thus ascertained, it is to be "effectuated unless forbidden by law. 'Contracts "are not to be interpreted by giving a strict and "rigid meaning to general words or expressions "without regard to the surrounding circumstances "or the apparent purpose which the parties sought "to accomplish'" (pp. 555-556).

And in *Sattler* vs. *Haydock, 160 N. Y., 291, 297,* the same court held: "It is always the duty of a "court, in construing a written instrument, if pos- "sible, to ascertain the intention of the parties; and "in order to determine its proper construction re- "sort must be had to the instrument as a whole, "and *effect must be given to every clause and part "thereof when it can be done without violence.*"

The rule in the United States courts is the same.

"Wherever words [of a contract] admit of a "more extensive or more restricted signification, "they must be taken in that sense which is re- "quired by the subject matter, and which will best "effectuate what it is reasonable to suppose was

"the real intention of the parties" per Marshall, Ch. J., in *Church* vs. *Hubbart, 2 Cranch 233.*

"All agree that as a general rule in the inter-"pretation of written instruments, the intention of "the parties must control, and that such intention "is to be gathered from the words used—the words "being interpreted, not literally nor loosely, but "according to their ordinary signification. If "the words be clear and explicit, leaving no room "to doubt what the parties intended, they must "be interpreted according to their natural and or-"dinary significance. If the words are ambiguous, "then resort may be had to such evidence, written "or oral, as will disclose the circumstances attend-"ing the execution of the instrument and place the "court in the situation in which the parties stood "when they signed the writing to be interpreted" per Harlan, J., in *U. S.* vs. *Choctaw Nation, 179 U. S. 494, 531.*

In the Gillet case *(160 N. Y., 549)*, the Court held that the provisions of a collateral note were intended to and did cover all transactions between the bank and its customer, but did not extend to the purchase of a dishonored note from a third person and the application of the bank's collateral to its payment. The intimated doubt of the good faith of the transaction there in question sufficiently distinguishes it from the present transaction, and the very principles by which the Court there reached its conclusion that that transaction was not covered by the collateral note, require the conclusion here that this transaction was covered by the collateral agreement.

In *Hutchinson* vs. *Manhattan Co., 150 N. Y. 250*, where a similar collateral note was involved, which authorized the application of "all moneys now or hereafter in their hands on deposit or otherwise to the credit of or belonging to the undersigned,

whether the said obligations or liabilities are then due or not due," the Court said: "It thus appears "that the relation existing between the bank and "Patton & Co. was something more than the or-"dinary one of bank and depositor. The defendant "bank held the written consent and authority of "Patton & Co. to apply on all their existing or "future obligations moneys belonging to them "which the bank held 'on deposit or otherwise'" (p. 254). The Court held that this covered the proceeds of a draft which the bank had received from Patton & Co., and had forwarded for collection, without accepting it as a deposit, although Patton & Co. were not the true owners of the draft. The Court held that the bank was also entitled to hold the proceeds as against Patton & Co., because "it parted with present value, relying on the draft "and its proceeds as part of its collateral security" (p. 255).

In *21 Am. & Eng. Enc. of Law (2d Ed.), p. 1016*, "otherwise is defined as meaning in a different "manner; in another way; differently; in other "respects. Like 'other,' 'otherwise' when followed "by an enumeration generally receives an *ejusdem* "*generis* interpretation. But, as in case of 'other,' "this rule has many exceptions, and where the in-"tent requires it a comprehensive interpretation "will be given to 'otherwise,' and the rule of *ejus-"dem generis* will be held to be inapplicable," citing many cases.

2. The defendant had the right to retain the notes by virtue of its banker's lien.

> "A bank advancing money to a party "dealing with it has a lien on all of the se-"curities of the latter which are in its hands "for the amount of his general balance, un-"less such securities are impressed with a "particular trust or some particular agree-"ment affects them. This lien rests upon the

"presumption of credit extended in faith of "securities in possession, or in expectancy, "but does not arise in reference to securi- "ties of a bank under circumstances, or "where there is a particular mode of deal- "ing, inconsistent with such lien. Nor where "they have been pledged for a particular "loan or debt. Nor will the bank be entitled "to a lien upon the funds of the depositor "merely to provide against a possible loss "on his unmatured paper which it has dis- "counted" (citing cases).

1 Daniels Neg. Inst. (5th Ed.), p. 342, §334b.

"The rule may be broadly stated, that the "bank has a general lien on all moneys and "funds of a depositor in its possession for "the balance of the general account. Of "course, so long as the balance is in favor "of the depositor, the lien has no vitality "in it. But when payment upon an over- "draft, a discount, an acceptance, or other "species of advance or loan by the bank to "him creates an indebtedness on his part, "all the funds which the bank has or obtains "to his credit may be applied upon such in- "debtedness until it is fully discharged and "without any request or direction from "him."

1 Morse on Banks and Banking (4th Ed.), § 324.

"It is familiar law that a bank receiving "notes for collection is entitled, in the ab- "sence of a contract expressed or implied "to the contrary, to retain them as security "for the debt of the party depositing the "notes (1 Jones' Liens (2d Ed.), §244; "*Bank of Metropolis* v. *New England Bank*, "1 How., 234, 239; *Reynes* v. *Dumont*, 130 "U. S., 354, 391, 392)," per Brewer, *J.*, in *Joyce* vs. *Auten, 179 U. S., 591*, at p. 597.

These authorities make it clear that the lien attaches to property which is not impressed with a trust inconsistent therewith. If the form of a remittance indicate that it is not the general property of the remitting bank, or if the remittance be made and received upon an agreement to apply it to a specific purpose, the lien will not attach; but such agreement or application to a specific purpose must affirmatively appear, for the presumption otherwise is that the lien attaches. In this case, the point is made that the letters enclosing the notes placed the notes in possession of the Hanover Bank only for discount, and that the Hanover Bank, upon refusing to discount the notes, was obliged to return them. But upon the refusal of the Hanover Bank to make the discount, its possession did not become unlawful; the notes still remained the property of the Abilene Bank, and there was no implied obligation to return them after the Abilene Bank became further indebted to the Hanover Bank.

There was no trust created nor special agreement in regard to these notes, any more than when notes are delivered for collection, as in *Joyce* vs. *Auten* (*supra*). That case cites the very cases relied on by the plaintiff as the authority for the "familiar law" stated above.

The question of the retention of the notes as collateral security for the previous rediscounts is not involved here, because a new advance of $3,500 was made in reliance upon the security of these notes, and that is the only indebtedness for which a lien is now claimed. The overdrafts by the Abilene Bank were equivalent to a request to make the advances upon the security of any property then in the hands of the Hanover Bank, and under the circumstances the four notes come within this description.

In Judge Wallace's opinion, he says: "If the

"check drawn by the Abilene Bank upon the de-"fendant, which caused the overdraft of its ac-"count, had been drawn with knowledge of the "defendant's refusal to discount the notes, a differ-"ent question would be presented; but it is fair to "assume that this check was drawn in the expecta-"tion that before its presentation the notes would "have been discounted and the proceeds credited to "the Abilene Bank" (p. 130). And also, "The Abi-"lene Bank had not asked for a temporary loan, "and was entitled to have its notes used as it had "directed, so as to realize their full proceeds; and "if not so used, it was entitled to make such dis-"position of the notes as it saw fit" (*Van Zandt* vs. *Hanover Nat. Bank, 149 Fed. Rep., 129*).

It may be conceded that the Abilene Bank drew the checks which caused the overdraft in the expectation that the notes would be discounted, but it had no right to *rely* upon such a credit, and the presentation of its checks or orders to pay, addressed to the Hanover Bank, in the absence of sufficient funds of its own to meet them, was a request by the Abilene Bank for advances to the amount thereof (whether in the form of overdraft or temporary loan is not material), for it certainly cannot be assumed that the Abilene Bank meant that payment of the checks should be refused if the notes were not discounted. Furthermore, the Abilene Bank knew on January 14th that the expected discount would not be made, and that the balance to its credit would be insufficient to meet the checks drawn by it and then outstanding; but it neither remitted additional funds or credits nor revoked these orders for payment. It is fair to assume that the Abilene Bank expected the Hanover Bank to pay the checks and recoup itself out of the notes, which were the only possible means of reimbursement then in its hands, and it must be treated as if

it had drawn the checks, knowing that they would, if paid, create an overdraft.

In *Reynes* vs. *Dumont*, *130 U. S.*, *35½*, at pages 390-394, the Chief Justice reviewed the cases at length, and decided that there a special agreement in writing between the parties was inconsistent with a general lien. The letters from the Abilene Bank are not inconsistent with a lien, for it was the hope of the bank that the Hanover Bank would lend it money by discounting the notes.

In *Biebinger* vs. *Continental Bank*, *99 U. S.*, *143*, a customer, after paying his debt, left his collateral at the bank. Subsequently, he again became indebted, and "it was held that *as it did not appear "that money was loaned or debt created on the "faith of possession of the deed*, the bank could "not claim against the debtor's assignee an equi-"table mortgage by the deposit of the con-"veyance" (as stated by Fuller, *Ch. J.*, in *Reynes* vs. *Dumont*, *130 U. S.*, at p. 393). In this case it is in evidence that the advance or loan in question was made wholly in reliance upon the notes (fol. 34).

In *Bank of Montreal* vs. *White*, *154 U. S.*, *660*, there is no statement of facts reported, but it is apparent that, at the time the note was received for discount and credit, there was an existing overdraft. While the Court held that, as the discount was refused, the bank could not retain the note as general collateral, yet it does not appear that the bank afterwards lent any money in reliance on the note, or else a very different question would have been presented. As reported, that case is similar to *Petrie* vs. *Myers*, *54 How. Pr.*, *513*, also cited by the plaintiff.

In *Armstrong* vs. *Chemical Nat. Bank*, *41 Fed. Rep.*, *234*, the Fidelity National Bank of Cincinnati, which was largely indebted to the Chemical Bank, negotiated a further loan on specific securi-

ties. The Chemical Bank advanced some money after receiving the securities, but asked that the equity be pledged to cover all indebtedness. Before a definite agreement was reached, an attachment was served and the Fidelity Bank failed. After defining the nature of a banker's lien and citing *Reynes* vs. *Dumont* (*supra*), it was held by Wallace, *J.*, at Circuit, that the Chemical Bank *could retain the amount of its subsequent advances*, but no more.

A case, very like this in its facts, is *Continental Nat. Bank* vs. *Weems, 69 Texas, 489* (cited in *1 Daniel's Neg. Inst., 5th Ed., p. 342, § 334b*). There the Texas Bank sent notes to the Continental Bank for rediscount and credit. The latter declined to discount the paper and so notified its correspondent. Before the letter reached Texas, drafts drawn in expectation of the discount reached New York. The Continental Bank paid these drafts, relying upon the notes for reimbursement. Upon the failure of the Texas Bank, the Continental Bank claimed to hold the notes, not only for the overdrafts, but also for the general balance of account. It was held that the Continental Bank had "no lien *except for the amount of the drafts paid after the paper was received*" (p. 501).

The Receiver of the Abilene Bank has no greater right to recover these notes than the Bank itself would have had if it had sued, and he took the assets subject to the obligations existing at the time of his appointment (*Scott* vs. *Armstrong, 146 U. S. 499; Rankin* vs. *City Nat. Bank, 208 U. S. 541*). It is inconceivable that the Abilene Bank would have been allowed to recover these notes without repaying the Hanover Bank the advances made at its request, and in reliance upon the security of the notes; and its letter of January 16th (fol. 34), written after it knew that the Hanover Bank had refused to rediscount the notes, does not

indicate a desire for the return of the notes, but contains a request for a loan with the notes as collateral, which it in fact received. It is submitted that the authorities uphold the application of the banker's lien to the present case.

3. The defendant had the right to retain the notes by authority or consent of the Abilene Bank.

The Abilene Bank undoubtedly expected the Hanover Bank to discount the notes and place the proceeds to its credit, and drew against its deposit account with this expectation, resulting in the overdraft of $3,500. The Hanover Bank could have declined not only to discount the notes, but also to pay the checks causing the overdraft. It did not know of the impending failure of the Abilene Bank, and after trying to communicate by telegraph without result, acted in the interests of the Abilene Bank to avoid injuring its credit or embarrassing it by reason of the refusal of the discount. It therefore advanced the necessary money to pay the checks in reliance upon the four notes as security, and then wrote the Abilene Bank that it had done so. Although not in possession of instructions to that effect, substantially such authority had already been mailed in Texas by the Abilene Bank on January 16, 1905: "Should you prefer, we will send our B/P with collaterals attached. We trust you will accord us the leniency asked for" (fol. 34). The authority or request was thereafter in existence (notwithstanding any construction put upon the letters of remittance) to loan the Abilene Bank $3,500 and hold the four notes as collateral security. This authority may be invoked to justify the action of the Hanover Bank.

Mailing the letters was a delivery to the Hanover Bank and to the Abilene Bank respectively. If the Abilene Bank had mailed cash or other

credits on January 14th, it cannot be doubted that the Hanover Bank could have lawfully appropriated them for its repayment, although not received until after the failure (*McDonald, Receiver,* vs. *Chemical Nat. Bank, 174 U. S. 610, 620; Ruggles* vs. *Am. Cent. Ins. Co., 114 N. Y. 415*). It seems clear that if the contents of the letter above quoted had been telegraphed to the Hanover Bank, there could be no question of its authority to hold the notes as collateral for its advances, and it is submitted that the action of the Hanover Bank in anticipation of authority, was confirmed by the letter then in the mails and subsequently received (*McDonald, Receiver,* vs. *Chemical Nat. Bank, supra*).

For these reasons the judgment below should be reversed and a new trial ordered.

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